

Kahler, Pam

LRB-0617  
drafting file

**From:** Kahler, Pam  
**Sent:** Tuesday, January 08, 2013 5:16 PM  
**To:** Iwata, Yuko - DOA  
**Subject:** RE: estate recovery draft language response

Yuko,

Most of the highlighted provisions are included in the latest version of the draft. In addition, I explained in my d-note with the first version why some of the other requested provisions were not included (they have singled out certain types of property when all property is included, so singling out some will most likely exclude others by omission) but that if DHS believes they need to have them included, they must expand on what, exactly, is subject to the department's right of recovery. For example, with a life insurance policy, are the payments that they are talking about the life insurance proceeds that go to the beneficiaries? They have not done so. Also, some of what they say is not included *is* included but not necessarily in the way in which they may be expecting to see it. For example, the draft *does* allow filing claims in the estates of surviving spouses, and marital property in which the recipient had an interest within the previous five years *is* included as part of the definition of "property," but not as part of the definition of "other arrangement" because that makes no sense. An "other arrangement" refers to how property is transferred outside of probate, such as through joint tenancy or a living trust.

I think that they will have to review the latest version of the draft and then we may need to meet to discuss the remaining issues. There are some problems, too. For example, you can't say that an individual's property interest continues after his or her death. That turns all of property law on its head. They must be trying to get at something, but I'm not sure what it is. And it could be that there are provisions that accomplish what they think they need to say that for.

Pam

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**From:** Iwata, Yuko - DOA [<mailto:Yuko.Iwata@wisconsin.gov>]  
**Sent:** Tuesday, January 08, 2013 4:16 PM  
**To:** Kahler, Pam  
**Cc:** Morgan, Charlie; Gauger, Michelle C - DOA  
**Subject:** FW: estate recovery draft language response

Hi Pam,

Attached shows provisions that were not incorporated in your draft (highlighted). Please let us know if you need any help from us or you would like to schedule a meeting with DHS.

Thanks,

**Yuko Iwata**  
Executive Policy and Budget Analyst  
Division of Executive Budget and Finance  
Department of Administration  
(608) 267 - 7980

**From:** Rosen, Lara K - DHS

**Sent:** Tuesday, January 08, 2013 3:31 PM

**To:** Gauger, Michelle C - DOA; Iwata, Yuko - DOA

**Cc:** Forsaith, Andrew C - DHS; Megna, Richard H - DHS; Wasilewski, Daniel L - DHS; Emmerton, Kathleen M - DHS; Garza, Jesus G - DHS; Willing, Krista E - DHS; Cunningham, Curtis J - DHS

**Subject:** estate recovery draft language response

Hi Yuko and Michelle,

As I mentioned on the phone last week, the Division noticed that a number of the estate recovery provisions had not yet been addressed in the draft statutory language you sent us from LRB. We have identified those provisions that appear to us to be missing in the drafting instructions (attachment 1 from the statutory language paper we submitted earlier this fall). I have attached a copy of the drafting instructions with all such provisions highlighted in yellow. We are holding off on submitting more specific comments/responses until we make sure we are all on the same page regarding the content of the provisions going into the bill draft.

Please let me know if you have any questions - I would be happy to schedule a meeting with you, LRB and the Division to further discuss.

Many thanks to you and LRB for all your assistance,  
Lara

**Lara Rosen**

Budget & Policy Analyst

Office of Policy Initiatives & Budget

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608-266-5655

[LaraK.Rosen@wisconsin.gov](mailto:LaraK.Rosen@wisconsin.gov)

## Estate Recovery Program

### Decision Needed

Should the State seek statutory changes to maximize the assets available to repay Medicaid through the Estate Recovery Program?

### Background

1. The Wisconsin Medicaid Estate Recovery Program seeks repayment for the cost of certain long term care services paid for by Medicaid on behalf of recipients. Recovery is made from the estates of recipients and from liens placed on their homes. The money recovered is returned to the Medicaid Program and used to fund Medicaid benefits.
2. Section 1917 (b) of the Social Security Act requires states to establish an estate recovery program that pursues recovery of benefits payments from the probate estates of permanently institutionalized Medicaid recipients of any age and certain benefits received by all Medicaid participants over the age of 55. Under 42 U.S.C. 1396p (b)(4)(b), federal law also allows states to include non-probate assets in their definition of estate for recovery purposes. Wisconsin currently recovers from those assets that are part of the probate estate, as well as certain non-probate assets.
3. The Department proposes changes to the Estate Recovery Program:
  - a. Expand the definition of estate to equal the full allowable federal definition;
  - b. Allow DHS to file notices of encumbrance and potential claims;
  - c. Limit the amount retained by a pooled trust;
  - d. Require DHS to be notified of terminations of special needs trusts;
  - e. Recover all services for members participating in a long-term care waiver program;
  - f. Recover the capitation payment amount in managed care situations; and
  - g. Void unrecorded and certain other real property transfers.

### Current Language

1. Current estate recovery statutes are under Wis. Stat. § 49.496. The Department's proposal would also affect marital property under chapter 766, as well as several other chapters.

## **Proposed Change**

1. Attachment 1 provides drafting instructions enumerating the current statutory language and proposed changes.
2. Attachment 2 explains how the Department would recover from the expanded estate.
3. Attachment 3 provides the statutory language referenced by Attachments 1 and 2, including statutory language from other states that have successfully expanded estate recovery.

**Desired Effective Date:** See Attachment 4.  
**Agency:** DHS  
**Agency Contact:** Lara Rosen  
**Phone:** 266-5655

## Attachment 1. Drafting Instructions

### Expanded Definition of Estate

#### Section 49.682 (2)(a) (Family Care)

1. This may have to be amended to make it clear that Family Care recovery follows s. 49.496, Wis. Stats. The rules (DHS 10.62) cover both Medicaid and Non-Medicaid Family Care (which doesn't exist anymore) and only reference certain provisions of s. 49.496.

#### ? Section 46.27 (7g) (Community Options Program) ✓

#### Section 49.682 (Wisconsin Chronic Disease Program)

#### Section 49.496 (Medicaid)

1. Define estate to the full allowable federal definition (probate estate plus all other optional property). See 42 USC 1396p 9(b) (4).
2. Define that the individual's property interest continues after his or her death. ← *nonspouse*
3. Define "other arrangement" to include all property that was at one time marital property *included* within the five years prior to the application for Medicaid or other recoverable program, no matter how subsequently titled. (See Idaho Supreme Court, In the Matter of the Estate of George D. Perry). Also include annuities in this definition (see State Medicaid *they would be* Manual 3810 B. 4.).
4. Define "personal property" to include any property that is not real property. This includes, but is not limited to, such things as cash, jewelry, household goods, *life would be included* insurance, properties, automobiles, promissory notes, etc. See Ohio Administrative Code 5101:1-38-10 (6).
5. Include language to allow filing claims in the estates of surviving spouses (and that the claim represents an obligation to the estate of the surviving spouse for Medicaid and *included* other recoverable program costs provided to the member spouse) (See Idaho Supreme Court, In the Matter of the Estate of George D. Perry and St. Mary's Medical Center v. Brody (Ct. App. 1994); Sinai Samaritan Medical Center Inc. v. McCabe (Ct. App. 1995); Froedert Memorial Lutheran Hospital, Inc. v. Jerome and Estelle Mueller (Ct. App. 1996); and Medical College of Wisconsin v. Missimer (Ct. App. 2009).) It should be clarified that a marriage settlement agreement or other such arrangement does not eliminate this obligation. State that it is presumed that all property in the surviving spouse's estate was community property of the deceased recipient or has been transferred by "other arrangement" and is subject to recovery unless rebutted by clear evidence. Offer an alternative method for the surviving spouse to limit the financial responsibility of his/her estate immediately after the member's death similar to South Dakota Codified Laws 28-6-23-1. ✓
6. Define the deceased member's interest in real property that is owned jointly with someone other than a spouse as being equal to the fractional interest the person would have owned in the jointly held property had the individual and the other owners held title to the property as tenants in common. For other property (not real estate), it is equal to the percentage deemed to have been the member's interest when determining program ✓

*Dept may...  
do need  
reason  
is a conclusion  
policy that  
legal argument*

eligibility or if undetermined at eligibility, equal to the fractional interest the person would have owned in the jointly held property. (Note: For eligibility purposes, joint bank accounts where only one of the joint owners is an EBD applicant are deemed to belong entirely to that EBD member.)

7. The deceased member's interest in a life estate should be defined as the member's percentage of ownership based on the member's age at the date of death and calculated using the property's fair market value and life estate/remainderman tables used by the Department to value life estates for Medicaid eligibility purposes. ✓
8. Fair market value should be defined as the price at which the property would change hands between a willing buyer and seller. The burden of proof for establishing the fair market value to the Department's satisfaction lies with the surviving owners or beneficiaries, or their representatives, and must be established through a credible methodology, including, but not limited to, an appraisal performed by a certified and licensed appraiser. ✓
9. Define the procedure to allow placing liens on real property that the member had an interest (joint, survivorship marital or individual property of the spouse that was once marital property per the definition of "other arrangement"). This process would include sending the joint owner a notice of claim and hearing rights relating to the extent or value of the deceased interest. (See Minnesota Statutes 256B.15 Subd. 1e, Subd. 1f.) ✓
10. Define the procedure to allow the Department to recover non-probate assets other than real property in which the member had an interest (joint, survivorship marital or individual property of the spouse that was once marital property per the definition of "other arrangement"). This process would include sending the joint owner or beneficiary a notice of claim and hearing rights relating to the extent or value of the deceased interest. This process would only be used to recover assets other than real estate from the member's estate when there is no surviving spouse or minor or disabled child and it would be used to recover non-probate assets from the estate of the member's surviving spouse.
11. State that the surviving property holders or beneficiaries have a right to request a hardship waiver pursuant to HFS 108.02 (12) prior to the Department placing a post-death lien. ✓
12. State that post-death liens will be released if the property is sold by the surviving spouse, minor or disabled child for fair market value/arms-length sale during their lifetime. If the spouse/disabled child transfers the property without consideration and the person receiving the property sells it for fair market value during the spouse's/disabled child's lifetime, make provisions to allow the lien to be released if the proceeds from the sale are secured in a trust, bond or other type of security. The secured amount would be paid to the Department upon the death of the surviving spouse or disabled child. State that if a surviving spouse or minor or disabled child refinances the property, the Department will subordinate its lien to the new encumbrance. (See Nevada Supreme Court, Nevada Department of Human Resources v. Estate of Ullmer.) ✓
13. Add a provision similar to Minnesota law that states that a surviving owner, or other interested party, may voluntarily pay off, settle or otherwise satisfy the claim/lien. The payoffs, settlements and satisfactions shall be deemed to be voluntary repayments of past Medicaid or other recoverable program payments for the benefit of the deceased recipient, and neither the process of settling the claim, the payment of the claim, nor ✓

acceptance of the payment shall constitute an adjustment or recovery that is otherwise prohibited. (See Minnesota Statutes 256B.15 subd. 1i (f).)

14. Add provisions similar to that in Wyoming Administrative Code that clarifies what costs will be allowed from the sale of the property. For example, if the property is not sold at the member's death, taxes and expenses for improvements made while the transferee lived in the home should not be allowed to be deducted from the amount due the Department from the sales proceeds. Having allowable costs in statute will greatly diminish discussion and argument when the sale of the property closes. (See Wyoming Department of Health, Wyoming Medicaid Rules, Chapter 35, Medicaid Benefit Recovery, Section 4 (kk).) ✓
15. Provide that the new type of liens obtained by the Department (or any liens obtained under §§ 49.496, 46.27 (7g), and 49.682) may be enforced by foreclosure in the same manner as a mortgage on real property. Clarify that liens have the same statute of limitations as a mortgage under Wis. Stat. s. 893.33 (30 years). ← D-note
16. Provide the Department with a simplified process to obtain a judgment or warrant against any surviving joint owner or beneficiary who fails to pay the Department's claim. This process could be devised to be similar to that enumerated in Wis. Stat. § 49.85, or a warrant process similar to that described in Wis. Stat. Chapter 71. ✓

— Section 445.125 (Funeral Directors – Burial Agreements)

1. Amend or create a section to make it clear that any funds from burial agreements (funded either through trusts or life insurance) that remain after funeral and burial costs have been paid are subject to the Department's claim for estate recovery under Wis. Stat. §§ 49.496, 46.27 (7g), 49.682, and 867.035. D-note

— Section 632.415 (Insurance Contracts in Specific Lines – Funeral policies)

1. Amend or create a section to make it clear that any funds from funeral policies that remain after funeral and burial costs have been paid are subject to the Department's claim for estate recovery under Wis. Stat. §§ 49.496, 46.27 (7g), 49.682, and 867.035. D-note

— Chapter 632, Subchapter V (Insurance Contracts in Specific Lines – Life Insurance and Annuities)

1. Amend or create a section to make it clear that any payments from life insurance contracts or annuities are subject to the Department's claim for estate recovery under Wis. Stat. §§ 49.496, 46.27 (7g), 49.682, and 867.035. D-note

1 — Chapter 700 (Interests in Property)

1. Amend or create a section to make it clear that transfer/ownership is subject to the Department's claim for estate recovery and post-death liens under Wis. Stat. §§ 49.496, 46.27 (7g), 49.682, and 867.035. D-note

very general

applies to any prop that was held??

Chapter 701 (Trusts)

1. Amend or create a section to make it clear that a living trust is required to pay the Department's claim for estate recovery under Wis. Stat. §§ 49.496, 46.27 (7g), 49.682, and 867.035.
2. Amend Wis. Stat. § 701.065 with language similar to Wis. Stat. § 859.07 (2)(a) and (b) to require the trustee to provide the Department with written notice when the trust is terminated. If the property has been distributed or transferred prior to the Department's

2013-2014 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-06177?ins  
PJK & TJD:.....

NW is any conflicting terms of an agreement or policy

add = poss of fund in ?

SECTION 1. 445.125 (3r) of the statutes is created to read:

in the possession of a fund in

445.125 (3r) SUBJECT TO CLAIM OF DEPARTMENT OF HEALTH SERVICES. Funds used

in the possession of a fund in

to fund a burial agreement that remain after payment has been made on behalf of

a decedent for the funeral or burial merchandise or services to be provided under the

agreement are subject to the right of the department of health services to recover

under s. 46.27 (7g), 49.496, 49.682, or 49.849 an amount equal to the medical

assistance that is recoverable under s. 49.496 (3) (a), an amount equal to aid under

s. 49.68, 49.683, or 49.685 that is recoverable under s. 49.682 (2) (a), or an amount

equal to long-term community support services under s. 46.27 that is recoverable

under s. 46.27 (7g) (c) 1. and that was paid on behalf of the decedent or the decedent's

spouse.

\*\*\*\*NOTE: Does this need to say if the remaining funds are, or were immediately before the death of the decedent, the property of the decedent?

SECTION 2. 632.415 (6) of the statutes is created to read:

in possession of fund in proper estate

632.415 (6) Proceeds of an insurance policy sold under sub. (2) that remain

after payment has been made on behalf of a decedent for the funeral merchandise

and services covered under the policy are subject to the right of the department of

health services to recover under s. 46.27 (7g), 49.496, 49.682, or 49.849 an amount

equal to the medical assistance that is recoverable under s. 49.496 (3) (a), an amount

equal to aid under s. 49.68, 49.683, or 49.685 that is recoverable under s. 49.682 (2)

(a), or an amount equal to long-term community support services under s. 46.27 that

is recoverable under s. 46.27 (7g) (c) 1. and that was paid on behalf of the decedent

or the decedent's spouse.

\*\*\*\*NOTE: Does this need to say if the remaining proceeds are, or were immediately before the death of the decedent, the property of the decedent?



request for recovery, require the trustee to provide information on the parties the property was distributed or transferred to. Clarify that the Department may seek recovery from the beneficiaries of any such distribution.

*Section 705.04 (2g) (Right of Survivorship)*

1. If the joint or P.O.D. account has been closed and the remaining balance transferred prior to the Department's request for recovery, require the financial institution to provide information on the parties the funds were transferred to. ✓

*Section 705.10 (Other Non-Probate Transfers)*

1. Amend or create a section to make it clear that property transferred under this section is subject to the Department's claim for estate recovery under Wis. Stat. §§ 49.496, 46.27 (7g), 49.682, and 867.035. If the property has been transferred prior to the Department's request for recovery, require the transferor to provide information on the parties to whom the property was transferred.

*Section 705.15 (TOD deeds)*

1. Amend or create a section to make it clear that beneficiary takes ownership subject to the Department's claim for estate recovery under Wis. Stat. §§ 49.496, 46.27 (7g), 49.682, and 867.035.

*Chapter 705, Subchapter III (Transfer on Death Security Registration)*

1. Amend or create a section to make it clear that ownership on death is subject to the Department's claim for estate recovery under Wis. Stat. §§ 49.496, 46.27 (7g), 49.682, and 867.035. If the property has been transferred prior to the Department's request for recovery, require the transferor to provide information on the parties to whom the property was transferred.

*Chapter 766 (Marital Property)*

1. Amend or create a section to define that all property that was at one time marital property within the five years prior to the application for Medicaid or other recoverable programs, no matter how subsequently titled, is subject to the Department's claim for estate recovery under Wis. Stat. §§ 49.496, 46.27 (7g), 49.682, and 867.035. State that the Department's claim is an obligation to the estate of the surviving spouse.

*Chapter 854 (Transfers on Death – General Rules)*


1. Amend or create a section to make it clear that transfers on death are subject to the Department's claim for estate recovery under Wis. Stat. §§ 49.496, 46.27 (7g), 49.682, and 867.035.
2. As an alternative to amending Wis. Stat. § 867.035, to allow an affidavit under that section to be used to recover non-probate assets, create a section with that authority in this Chapter. It may be better applicable because it appears that almost all transfers at death refer back to this chapter.

*Section 867.03 (Transfer by Affidavit)*

1. Amend (1m) (b) to remove the 10 day requirement.


2. Amend (2g) to include that property being transferred is subject to the Department's estate recovery claims.

#### ***Section 867.035 (Transfer by Affidavit)***

1. Cross reference back to the definition of estate/property described in Wis. Stat. § 49.496, or as applicable for other programs.
2. Include language to allow affidavits to be used in the estates of surviving spouses. State that it is presumed that the surviving spouse's estate is all property subject to recovery unless rebutted by clear evidence.
3. Clarify that the Department's affidavit may be used to recover non-probate assets (assets not subject to administration) in any amount (not limited to the amount specified by Wis. Stat. § 867.03(1)(intro.)). Alternatively, create a new affidavit process (perhaps in Chapter 854) to allow the Department to recover non-probate assets in any amount.
4. Remove the requirement that the affidavit cannot be used until 20 day after the individual's date of death before the affidavit can be used. 

#### **Notice of Encumbrance/Potential Claim**

#### ***Chapter 706 (Conveyances of Real Property; Recording; Titles)***

1. Amend or create sections in this chapter to provide for the notice of encumbrance/notice of potential claim. Combine the best elements of notice of encumbrance language (sans hearing rights because the notice does not constitute a lien on the property during the recipient's life and hearing rights will be provided prior to filing a post-death lien) from Washington (RCW 64.04.210, RCW 43.43.20B.750), Oregon (ORS 93.268, ORS 411.692, ORS 411.694), Idaho (55-819 Idaho Code, 56-225 Idaho Code) and notice of potential claim (Minnesota Statutes 256B.15 Subd. 1c., Subd. 1d.). 
2. Clarify this notice applies to all ownership interests/transfers, including a vendor's interest in a land contract and the assignment of a land contract. Clarify that this notice can be filed for any real property the recipient has an interest in and any real property that was at one time the recipient's marital property within five years prior to her/his application for Medicaid (or other recoverable program), no matter if it is titled solely in the spouse's name.

#### **Limit the Amount Retained by a Pooled Trust**

#### ***Section 49.454***

1. Amend or create a provision that pooled trusts established 42 USC 1396p (d) (4) (C) may only retain up to 30 percent of the remaining trust balance at a member's death. (See Minnesota Statutes 256B.056, Subd. 3b. (d).)

#### ***Section 701.06***

1. Amend to clarify that pooled trusts established 42 USC 1396p (d) (4) (C) may only retain up to 30 percent of the remaining trust balance at a member's death.

## **Notice of Termination of Special Need Trust**

### *Section 49.454*

1. Amend or create a provision that trustees of trusts established 42 USC 1396p (d) (4) must notify the Department at the member's death and comply with the Medicaid repayment language in the trust within 30 days of the date of death. Failure to notify the Department and repay Medicaid to the extent possible would be considered a breach of duties and the trustee would be personally liable for the Department's costs in recovering any assets distributed prior to Medicaid repayment and for the amount of any assets that could not be recovered.
2. Failure to provide notice on a pooled trust would result in the pooled trust being prohibited from retaining any of the trust assets/funds.

### *Section 701.06*

1. Amend to clarify that trustees of trusts established 42 USC 1396p (d) (4) must notify the Department at the member's death and comply with the Medicaid repayment language in the trust.

## **Recovery of All Services for Members Participating in a Long-Term Care Waiver Program**

### *Section 49.496*

1. Amend subd. (3)(a) 2. to extend recovery to all services received while participating in any long-term care waiver (rather just related inpatient and drugs specified by (b) and (c), or while participating in the Program of All-Inclusive Care for the Elderly (PACE). This would supersede DHS 108.02 (10) (c) 3., 4., 5. and 6. *in from the 1st version*

## **Recovery of the Capitation Payment Amount in Managed Care Situations**

### *Section 49.496*

1. Define the amount of medical assistance paid to be the capitation amount for services received in a managed care setting. This would include Family Care, Partnership and PACE. This would supersede DHS 10.62 (1)(a).

## **Voiding Unrecorded and Certain Other Real Property Transfers**

### *Section 706.08*

1. Amend or create a provision that provides that any conveyance that was delivered, but not recorded or not reported to the Medicaid agency during a period of time the individual was eligible for Medicaid may be voided and the property returned to the individual or estate of the individual. A notwithstanding clause referencing this provision can be included in Subd. (1a) can be inserted to continue to protect purchasers of good faith and for valuable consideration if thought necessary.

### *Chapter 49*

1. Create a section in Chapter 49 that allows fraudulent transfers or transfers for less than fair market value to be voided or an action taken. (See Minnesota Statutes 256B.0595.

subd. 8.; Oregon ORS 411.708 and 411.620; Florida Statutes 414.28 (3); Idaho Statutes 56-218 (2); Iowa Administrative Code 441-89(249F); Kansas Code 39-709 (g)(2); and Illinois 305 ILCS 5/3-11.)



State of Wisconsin  
2013 - 2014 LEGISLATURE



LRB-0817/P2  
PJK&TJD:jld:rs

DOA:.....lwata, BB0260 - Estate recovery for Medical Assistance

**FOR 2013-2015 BUDGET - NOT READY FOR INTRODUCTION**

1 AN ACT ...; relating to: the budget.

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**Analysis by the Legislative Reference Bureau  
HEALTH AND HUMAN SERVICES MEDICAL  
ASSISTANCE**

This is a preliminary draft. An analysis will be provided in a subsequent version of this draft.

For further information see the state fiscal estimate, which will be printed as an appendix to this bill.

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The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

2 SECTION 1. 20.435 (4) (im) of the statutes is amended to read:

3 20.435 (4) (im) Medical assistance; correct payment recovery; collections; other

4 recoveries. All moneys received from the recovery of correct medical assistance

5 payments under ss. 49.496 and ~~867.035 and rules promulgated under s. 46.286 (7)~~

6 49.849, all moneys received as collections and other recoveries from providers, drug

?

Comment [RLK1]: Should s. 49.848 be referenced in this section?

1 manufacturers, and other 3rd parties under medical assistance performance-based  
2 contracts, and all moneys credited to this appropriation account under s. 49.89 (7)  
3 (f), for payments to counties and tribal governing bodies under s. 49.496 (4) (a), for  
4 payment of claims under s. ~~867.035 (3)~~ 49.849 (5), for payments to the federal  
5 government for its share of medical assistance benefits recovered, for the state share  
6 of medical assistance benefits provided under subch. IV of ch. 49, and for costs related  
7 to collections and other recoveries.

8 SECTION 2. 20.435 (4) (in) of the statutes is amended to read:

9 ~~20.435 (4) (in) Community options program, family care, recovery of costs~~  
10 ~~administration.~~ From the moneys received from the recovery of costs of care under  
11 ss. 46.27 (7g) and ~~867.035 and under rules promulgated under s. 46.286 (7)~~ 49.849  
12 for enrollees who are ineligible for medical assistance, the amounts in the schedule  
13 for administration of the recovery of costs of the care.

?  
Comment [RLK2]: Should s. 49.849 be referenced in this section?

14 SECTION 3. 20.435 (7) (im) of the statutes is amended to read:

15 ~~20.435 (7) (im) Community options program, family care benefit, recovery of~~  
16 ~~costs, birth to 3 waiver administration.~~ From the moneys received from the recovery  
17 of costs of care under ss. 46.27 (7g) and ~~867.035 and under rules promulgated under~~  
18 ~~s. 46.286 (7)~~ 49.849 for enrollees who are ineligible for medical assistance, all moneys  
19 not appropriated under sub. (4) (in), and all moneys transferred to this appropriation  
20 account from the appropriation account under sub. (4) (o), for payments to county  
21 departments and aging units under s. 46.27 (7g) (d), payments to care management  
22 organizations for provision of the family care benefit under s. 46.284 (5), payment of  
23 claims under s. ~~867.035 (3)~~ 49.849 (5), payments for long-term community support  
24 services funded under s. 46.27 (7) as provided in ss. 46.27 (7g) (e) and ~~867.035 (4m)~~  
25 49.849 (6) (b), and for administration of the waiver program under s. 46.99.

?  
Comment [RLK3]: Should s. 49.849 be referenced in this section?

SECTION 4. 46.286 (7) of the statutes is amended to read:

46.286 (7) RECOVERY OF FAMILY CARE BENEFIT PAYMENTS; RULES. The department shall promulgate rules relating apply to the recovery from persons who receive the family care benefit, including by liens and affidavits and from estates, of correctly and incorrectly paid family care benefits, that are substantially similar to the applicable provisions under ss. 49.496 and ~~49.497~~ 49.849.

SECTION 5. 46.287 (2) (a) 1. k. of the statutes is amended to read:

46.287 (2) (a) 1. k. Recovery of family care benefit payments under ~~s. 46.286~~ (7).

SECTION 6. 49.496 (1) (a) of the statutes is renumbered 49.496 (1) (ah).

SECTION 7. 49.496 (1) (af) of the statutes is created to read:

49.496 (1) (af) "Decedent" means a deceased recipient or a deceased nonrecipient surviving spouse, whichever is appropriate.

SECTION 8. 49.496 (1) (bk) of the statutes is created to read:

49.496 (1) (bk) "Long-term care program" means any of the following:

1. The family care program providing the benefit under s. 46.286.
2. The self-directed services option that operates under a waiver from the secretary of the federal department of health and human services under 42 USC 1396n (c) in which an enrolled individual selects his or her own services and service providers.

3. The family care partnership program that is an integrated health and long-term care program operated under an amendment to the state medical assistance plan, as authorized in 42 USC 1396n (i).

4. The program for all-inclusive care for the elderly under 42 USC 1396u-4.

*? Same as how 49.496 changed?*

Comment [RLK4]: Please amend s. 47.27(7g) to include new language for CDP recoveries. Also, please see Comment [RLK5] below - if we change the definition in 49.496, we should include the definition here.

Comment [RLK5]: s. 49.496 - The surviving spouse's estate will contain solely owned property of the surviving spouse that was at one time non-probate/marital property of the deceased Medicaid recipient. Wouldn't we want to define property of the recipient (i.e. federal definition) somewhere in 49.496? We also want to include all property that was marital property five years prior to the recipient spouse applying for public assistance in that definition. If we agree to include the definition in 49.496, see Comment [RLK31].

*↓  
no - 49.496 is only what is in probate estate (either is or isn't state)*

Comment [RLK6]: Partnership does not operate under 42 USC 1396n(i). It operates as a State Plan Amendment program under 42 U.S.C. 1396u-2 to offer full Medicaid benefit in managed care situation, and 1396n(c) to provide waiver services provided in the benefit.

## SECTION 8

1        5. Any program that provides long-term care services and is operated by the  
2        department under an amendment to the state medical assistance plan under 42 USC  
3        1396n (i), a waiver of medical assistance laws under 42 USC 1396n (c) or 42 USC  
4        1396n (b) and (c), or a demonstration project under 42 USC 1315 or 42 USC 1396n  
5        (c).

6        SECTION 9. 49.496 (1) (bw) of the statutes is created to read:

7        49.496 (1) (bw) "Nonrecipient surviving spouse" means any person who was  
8        married to a recipient while the recipient was receiving services for which the cost  
9        may be recovered under sub. (3) (a) and who survived the recipient.

10       SECTION 10. 49.496 (3) (a) (intro.) of the statutes is amended to read:

11       49.496 (3) (a) (intro.) Except as provided in par. (b), the department shall file  
12       a claim against the estate of a recipient, and against the estate of a nonrecipient  
13       surviving spouse, for all of the following, subject to the exclusion of any amounts  
14       under the Long-Term Care Partnership Program established under s. 49.45 (31),  
15       unless already recovered by the department under this section:

16       SECTION 11. 49.496 (3) (a) 2. a. of the statutes is amended to read:

17       49.496 (3) (a) 2. a. Home-based or community-based services under 42 USC  
18       1396d (a) (7) and (8) ~~and under any waiver granted under 42 USC 1396n (c) (4) (B)~~  
19       ~~or 42 USC 1396u.~~

20       SECTION 12. 49.496 (3) (a) 2. am. of the statutes is created to read:

21       49.496 (3) (a) 2. am. Any services provided as a benefit under a long-term care  
22       program.

23       SECTION 13. 49.496 (3) (a) 2. b. of the statutes is repealed.

24       SECTION 14. 49.496 (3) (a) 2. c. of the statutes is repealed.

25       SECTION 15. 49.496 (3) (ad) of the statutes is created to read:

**Comment [RLK7]:** Why has 1396u been stricken? We recover costs paid out through the Community Supported Living Arrangement programs, which have been covered by this statute. Has this authority been phased out and replaced? If so, would we still be able to recover based on law in effect prior to this revision or do we need to keep it included in statute?

**Comment [RLK8]:** Specify all Medical Assistance services received by an individual while participating in an LTC program, since some programs (e.g. Family Care, COP-W, IRIS) don't cover all services -- some are paid through the card.



1        49.496 (3) (ad) The amount the department may claim against an estate of a  
2        recipient for services that are described under par. (a) 2. am. and that are provided  
3        by a managed long-term care program funded by capitated payments is equal to the  
4        amount of the capitated payment for that recipient.

5        **SECTION 16.** 49.496 (3) (aj) of the statutes is created to read:

6        49.496 (3) (aj) There is a presumption, which may be rebutted by clear and  
7        convincing evidence, that all property in the estate of a nonrecipient surviving  
8        spouse was marital property held with the recipient and that 100 percent of the  
9        property in the estate of the nonrecipient surviving spouse is subject to the  
10       department's claim under par. (a).

11       **SECTION 17.** 49.496 (3) (am) (intro.) of the statutes is amended to read:

12       49.496 (3) (am) (intro.) The court shall reduce the amount of a claim under par.  
13       (a) by up to the amount specified in s. 861.33 (2) if necessary to allow the recipient's  
14       decedent's heirs or the beneficiaries of the ~~recipient's~~ decedent's will to retain the  
15       following personal property:

16       **SECTION 18.** 49.496 (3) (c) 1. of the statutes is amended to read:

17       49.496 (3) (c) 1. If the department's claim is not allowable because of par. (b)  
18       and the estate includes an interest in any real property, including a home, the court  
19       exercising probate jurisdiction shall, in the final judgment or summary findings and  
20       order, assign the interest in the ~~home~~ real property subject to a lien in favor of the  
21       department for the amount described in par. (a). The personal representative or  
22       petitioner for summary settlement or summary assignment of the estate shall record  
23       the final judgment as provided in s. 863.29, 867.01 (3) (h), or 867.02 (2) (h).

24       **SECTION 19.** 49.496 (3) (c) 2. of the statutes is amended to read:

1 49.496 (3) (c) 2. If the department's claim is not allowable because of par. (b),  
 2 the estate includes an interest in any real property, including a home, and the  
 3 personal representative closes the estate by sworn statement under s. 865.16, the  
 4 personal representative shall stipulate in the statement that the ~~home~~ real property  
 5 is assigned subject to a lien in favor of the department for the amount described in  
 6 par. (a). The personal representative shall record the statement in the same manner  
 7 as described in s. 863.29, as if the statement were a final judgment.

8 **SECTION 20.** 49.496 (3) (d) (intro.) of the statutes is amended to read:

9 49.496 (3) (d) (intro.) The department may not enforce the a lien under par. (c)

10 on a home as long as any of the following survive the decedent:

\*\*\*NOTE: Am I correct to assume that, even with the survivors mentioned, the lien may be enforced against real property that is not a home?

Comment [RLK9]: Add or cross-reference provisions of 49.849(5)(b) and (c) regarding when a surviving spouse or disabled child sells property.

Comment [RLK10]: Actually, we do not make any recoveries when there is a spouse or minor or disabled child.

11 **SECTION 21.** ~~49.496 (3m) of the statutes is created to read:~~

12 ~~49.496 (3m) LIMITING FINANCIAL RESPONSIBILITY OF SPOUSE'S ESTATE. A~~

13 ~~nonrecipient surviving spouse may, no later than 6 months after the~~  
 14 ~~recipient's~~

14 ~~death, file a petition with the department to limit the financial responsibility~~  
 15 ~~under~~

15 ~~this section of the nonrecipient surviving spouse's estate. The~~  
 16 ~~financial~~

16 ~~responsibility of the nonrecipient surviving spouse's estate may not exceed the~~  
 17 ~~value~~

17 ~~of the nonrecipient surviving spouse's estate as of the date of death of the~~  
 18 ~~recipient.~~

\*\*\*NOTE: This is based on the language of the South Dakota law suggested in the instructions. The South Dakota law does not say what happens after the petition is filed. May DHS grant or deny the petition? Should DHS promulgate rules establishing standards for granting or denying petitions similar to the rules for granting hardship waivers? Does the second sentence mean that the financial responsibility of the surviving spouse's estate may not exceed its value on the recipient's date of death but DHS may limit it to less than that? Or does this mean that DHS may take note of the value of the surviving spouse's estate on the recipient's date of death and limit the financial responsibility to that value? I'm not sure how to interpret the second sentence, i.e., whether the stated financial responsibility is before or after limitation.

Comment [RLK11]: Language removed - we will attempt to accomplish the same through program operations.

18

**SECTION 22.** 49.496 (6) (b) of the statutes is amended to read:

1        49.496 (6) (b) The department may file a claim under sub. (3) only with respect  
2        to a recipient who dies after ~~September 30, 1994~~ the date that is 90 days after the  
3        effective date of this paragraph .... [LRB inserts date].

4        SECTION 23. 49.496 (6m) of the statutes is amended to read:

5        49.496 (6m) WAIVER DUE TO HARDSHIP. The department shall promulgate rules  
6        establishing standards for determining whether the application of this section would  
7        work an undue hardship in individual cases. If the department determines that the  
8        application of this section would work an undue hardship in a particular case, the  
9        department shall waive application of this section in that case. This subsection does  
10       not apply with respect to claims against the estates of nonrecipient surviving  
11       spouses.

12       SECTION 24. 49.4962 of the statutes is created to read:

13       49.4962 Voiding certain transfers of real property. (1) DEFINITIONS. In  
14       this section:

15       (a) "Conveyance" has the meaning given in s. 706.01 (4).

16       (b) "Fair market value" means the price that a willing buyer would pay a willing  
17       seller for the purchase of real property.

18       (c) "Fraudulent transfer" means any of the following:

19       1. A transfer of title to real property for less than fair market value.

20       2. A transfer of title to real property by a conveyance that is not recorded during  
the lifetime of the grantor in the

21       office of the register of deeds of the county in which the real property is located.

22       (2) VOIDABLE TRANSFERS. (a) A transfer of real property to which all of the  
23       following apply is voidable by the department:

Comment [RLR12]: These type of vest pocket conveyances are always recorded with the register of deeds at some point after the death of the recipient/grantor. That's how they are usually discovered.

1 1. The transfer was made by a person receiving or who received medical  
2 assistance, or someone on his or her behalf, during the time that the person was  
3 eligible for medical assistance.

4 2. The department was not notified and was unaware that the transfer was  
5 made.

6 3. The transfer was made to hinder, delay, or defraud the department from  
7 recovering medical assistance benefits that were paid on behalf of the transferor.

8 (b) The department may commence an action in circuit court against the  
9 transferee to void the transfer. If the court voids the transfer, the title to the real  
10 property reverts to the transferor or his or her estate.

~~Note: Practically, how would the department void a transfer except by a court  
action?~~

✓  
Comment [R1313]: The Department would  
initiate a court action to void a transfer.

11 (3) PRESUMPTION. There is a presumption, which may be rebutted by clear and  
12 convincing evidence, that a transfer described in sub. (2) (a) 1. that is a fraudulent  
13 transfer was made to hinder, delay, or defraud the department from recovering  
14 medical assistance benefits that were paid on behalf of the transferor.

15 (4) BURDEN OF PROOF. With respect to a transfer under sub. (1) (c) 1., the burden  
16 of proof for establishing fair market value is on the party to whom the property was  
17 transferred. Fair market value must be established through a credible methodology,  
18 which may include an appraisal performed by a licensed appraiser.

19 (5) INAPPLICABLE TO PURCHASER IN GOOD FAITH. Subsection (2) does not apply if,  
20 after the transfer described in sub. (2), the real property was transferred by a  
21 conveyance to a purchaser in good faith and for a valuable consideration and the  
22 conveyance was recorded.

23 ~~SECTION 25. 49.862 (1) (am) of the statutes is created to read:~~

Comment [R1314]: See Comment [R1313] re  
Section 6. Include definition of property in 49.862?

no - only what is  
in the estate

1           49.682 (1) (am) "Decedent" means a deceased client or a deceased nonclient  
2 surviving spouse, whichever is applicable.

3           **SECTION 26.** 49.682 (1) (d) of the statutes is created to read:

4           49.682 (1) (d) "Nonclient surviving spouse" means any person who was married  
5 to a client while the client was receiving services for which the cost may be recovered  
6 under sub. (2) (a) and who survived the client.

7           **SECTION 27.** 49.682 (2) (a) of the statutes is amended to read:

8           49.682 (2) (a) Except as provided in par. (d), the department shall file a claim  
9 against the estate of a client ~~or, and~~ against the estate of the a nonclient surviving  
10 spouse ~~of a client,~~ for the amount of aid under s. 49.68, 49.683, or 49.685 paid to or  
11 on behalf of the client.

12          **SECTION 28.** 49.682 (2) (bm) of the statutes is created to read:

13          49.682 (2) (bm) There is a presumption, which may be rebutted by clear and  
14 convincing evidence, that all property in the estate of the nonclient surviving spouse  
15 was marital property held with the client and that 100 percent of the property in the  
16 estate of the nonclient surviving spouse is subject to the department's claim under  
17 par. (a).

18          **SECTION 29.** 49.682 (2) (c) (intro.) of the statutes is amended to read:

19          49.682 (2) (c) (intro.) The court shall reduce the amount of a claim under par.  
20 (a) by up to the amount specified in s. 861.33 (2) if necessary to allow the ~~client's~~  
21 decedent's heirs or the beneficiaries of the ~~client's~~ decedent's will to retain the  
22 following personal property:

23          **SECTION 30.** 49.682 (2) (e) 1. of the statutes is amended to read:

24          49.682 (2) (e) 1. If the department's claim is not allowable because of par. (d)  
25 and the estate includes an interest in real property, including a home, the court

1 exercising probate jurisdiction shall, in the final judgment or summary findings and  
2 order, assign the interest in the ~~home~~ real property subject to a lien in favor of the  
3 department for the amount described in par. (a). The personal representative or  
4 petitioner for summary settlement or summary assignment of the estate shall record  
5 the final judgment as provided in s. 863.29, 867.01 (3) (h), or 867.02 (2) (h).

6 SECTION 31. 49.682 (2) (e) 2. of the statutes is amended to read:

7 49.682 (2) (e) 2. If the department's claim is not allowable because of par. (d),  
8 the estate includes an interest in real property, including a home, and the personal  
9 representative closes the estate by sworn statement under s. 865.16, the personal  
10 representative shall stipulate in the statement that the ~~home~~ real property is  
11 assigned subject to a lien in favor of the department for the amount described in par.  
12 (a). The personal representative shall record the statement in the same manner as  
13 described in s. 863.29, as if the statement were a final judgment.

14 SECTION 32. 49.682 (2) (f) (intro.) of the statutes is amended to read:

15 49.682 (2) (f) (intro.) The department may not enforce the lien under par. (e)

16 ~~on a home~~ as long as any of the following survive the decedent:

✓  
Comment [RLK15]: See comment [RLK1] at Section 20.

17 SECTION 33. 49.682 (2m) of the statutes is created to read:

18 49.682 (2m) A nonclient surviving spouse may, no later than 6 months after  
19 the client's death, file a petition with the department to limit the financial  
20 responsibility under this section of the nonclient surviving spouse's estate. The  
21 financial responsibility of the nonclient surviving spouse's estate may not exceed the  
22 value of the nonclient surviving spouse's estate as of the date of death of the client.

\*\*\*NOTE: See \*\*\*NOTE after proposed s. 49.495 (3m)\*\*\*

✓  
Comment [RLK16]: Language amended. See comment [RLK11] at Section 20.

23 SECTION 34. 49.682 (3) of the statutes is amended to read:

1        49.682 (3) The department shall administer the program under this section  
2        and may contract with an entity to administer all or a portion of the program,  
3        including gathering and providing the department with information needed to  
4        recover payment of aid provided under s. 49.68, 49.683, or 49.685. All funds received  
5        under this subsection, net of any amount claimed under s. ~~867.035 (3)~~ 49.849 (5),  
6        shall be remitted for deposit in the general fund.

7        **SECTION 35.** 49.682 (4) (b) of the statutes is amended to read:

8        49.682 (4) (b) The department may file a claim under sub. (2) only with respect  
9        to a client who dies after ~~September 1, 1995~~ the date that is 90 days after the effective  
10       date of this paragraph .... [LRB inserts date].

11       **SECTION 36.** 49.682 (5) of the statutes is amended to read:

12       49.682 (5) The department shall promulgate rules establishing standards for  
13       determining whether the application of this section would work an undue hardship  
14       in individual cases. If the department determines that the application of this section  
15       would work an undue hardship in a particular case, the department shall waive  
16       application of this section in that case. This subsection does not apply with respect  
17       to claims against the estates of nonclient surviving spouses.

18       **SECTION 37.** ~~49.848 of the statutes is created to read:~~

19       **49.848 Treatment of real property owned by certain public assistance**  
20       **recipients. (1) DEFINITIONS.** In this section:

21       (a) "Department" means the department of health services.

22       (b) "Public assistance" means any services provided as a benefit under a  
23       long-term care program, as defined in s. 49.496 (1) (bk), that may be recoverable  
24       under s. 49.496 (3) (a); medical assistance under subch. IV that may be recoverable  
25       under s. 49.496 (3) (a); long-term community support services funded under s. 46.27

3  
2  
1  
Comment [81.83.7]: Do any references to appropriations under Ch. 20 need to be included in 49.848?



(7) that may be recoverable under s. 46.27 (7g) (c) 1.; or aid under s. 49.68, 49.683, or 49.685 that may be recoverable under s. 49.682 (2) (a).

(c) "Recipient" means a person who received public assistance.

(2) CREATION OF DOCUMENTS FOR RECORDING. The department shall create all of the following documents for recording in the office of the register of deeds in the real estate records index:

(a) A document entitled "REQUEST FOR NOTICE OF TRANSFER OR ENCUMBRANCE AND

NOTICE OF POTENTIAL CLAIM," which shall provide notice that the department has an interest in whether a property is encumbered or transferred or

may have a claim against the property to which the document relates on the basis

of providing public assistance to a recipient who has or had a legal interest in the

property and shall require that any person proposing to transfer title to, encumber,

or terminate an interest in, the property must provide notice of that proposed

transfer, encumbrance, or termination of interest to the department.

a) A title insurance company or agent that discovers the presence of a REQUEST FOR

NOTICE OF TRANSFER OR ENCUMBRANCE AND NOTICE OF POTENTIAL CLAIM when

performing a title search on real property shall disclose the presence of the request for notice of

transfer or encumbrance in any report preliminary to, or any

commitment to offer, a certificate of title insurance for the real property; and

(b) Any individual transferring title to, encumbering, or terminating an interest in real property

shall notify the department of the proposed transfer, encumbrance, or termination of interest.

\*\*\*NOTE: Wouldn't providing information about a public assistance receipt violate confidentiality requirements under various statutes, such as s. 49.45 (4), or do you consider this disclosure part of program administration?

\*\*\*NOTE: Usually a person who is acquiring property checks the title. Rather than "transferring title" should this say a person "acquiring title" needs to notify the department? A person transferring title would probably be the person who received public assistance.

**Comment [RLK18]:** It is part of program administration. OLC has no concerns - see 42 CFR 164.512(a),(c) and (f).

**Comment [RLK19]:** See language above. This situation is somewhat similar to our TEFLA liens where the title company notices the lien and it is the seller's responsibility to get the lien released (although the title company often does all the work to ensure it gets done).

- 14 (b) A document entitled "TERMINATION OF REQUEST FOR NOTICE OF  
TRANSFER OR
- 15 ENCUMBRANCE AND NOTICE OF POTENTIAL CLAIM," which shall provide
- 16 notice that the department no longer has a claim against property an interest in  
whether the property is encumbered or transferred for which a
- 17 REQUEST FOR NOTICE OF TRANSFER OR ENCUMBRANCE AND NOTICE  
OF POTENTIAL
- 18 CLAIM has been recorded and that no notice to the department is required when title
- 19 to the property is transferred, an encumbrance is placed on the property, or an
- 20 interest in the property is terminated.

1 (c) A document entitled "CERTIFICATE OF CLEARANCE," which shall  
2 authorize, by the department, the transfer of title to, encumbering of, or termination  
3 of an interest in, property against which a REQUEST FOR NOTICE OF  
TRANSFER OR  
4 ENCUMBRANCE AND NOTICE OF POTENTIAL CLAIM has been recorded, but  
5 against which a TERMINATION OF REQUEST FOR NOTICE OF  
6 TRANSFER OR ENCUMBRANCE AND NOTICE OF POTENTIAL CLAIM has  
not been recorded. Recording of the CERTIFICATION OF CLEARANCE shall provide that  
notice to the department is no longer required when title to the property is transferred, an  
encumbrance is placed on the property, or an interest in the property is terminated.

7 (3) RECORDING OF REQUEST FOR NOTICE AND TERMINATION OF REQUEST FOR NOTICE.

8 (a) 1. Whenever an individual becomes eligible for public assistance, the department  
9 shall record a REQUEST FOR NOTICE OF TRANSFER OR ENCUMBRANCE  
AND NOTICE OF

10 POTENTIAL CLAIM if the individual has any of the following ownership interests  
11 in real property:

12 a. A current ownership interest in real property, including as a vendee or  
13 vendor under a land contract or in real property held in a revocable trust.

14 b. ~~Within the previous 5 years, a marital property interest in real property~~  
~~that is currently owned by the individual or his or her spouse.~~

15 including as a vendee or vendor under a land contract or in real property held in a  
16 revocable trust, regardless of ~~who~~ which spouse currently holds title to the property  
when the individual

17 ~~becomes eligible for public assistance.~~

~~---Note: What if the real property that was marital property was sold for fair  
market value before the individual became eligible for public assistance? Are you truly  
interested in property that is held by the individual or the individual's spouse with whom  
the individual had a marital property interest in the property?~~

18 2. The department shall record the document in the office of the register of  
19 deeds of the county in which the real property under subd. 1. a. or b., whichever is

Comment (REJ20): What actually went in  
you have is that anything that has been marital  
property from 5 years prior to application to the  
present is subject to recovery.

Comment (REJ21): We are only interested in  
property that is currently held by the individual or  
the individual's spouse with whom the individual  
had a marital property interest in the property.

20 applicable, is located.

21 (b) Whenever the department determines that it no longer has an  
interest in whether the property of a recipient for whom the

22 department recorded a REQUEST FOR NOTICE OF TRANSFER OR  
ENCUMBRANCE AND

23 NOTICE OF POTENTIAL CLAIM has ~~not incurred or no longer owes any amount~~

1 ~~that is recoverable under s. 46.27 (7g) (c) 1., 49.496 (3) (a), or 49.682 (2) (a), been~~  
2 encumbered or transferred, the  
3 department shall record a TERMINATION OF REQUEST FOR NOTICE OF  
4 TRANSFER OR  
5 ENCUMBRANCE AND NOTICE OF POTENTIAL CLAIM in the office of the  
6 register of deeds of each county in which a REQUEST FOR NOTICE OF  
7 TRANSFER OR ENCUMBRANCE AND NOTICE OF POTENTIAL CLAIM with  
8 respect to the  
9 recipient's property was recorded.

---NOTE: What if the department never makes the determination? The original  
recorded document could put a cloud on title to the property indefinitely.

Comment (RLK22): If the recorder is lying the  
property can transfer without any termination of  
notice or clearance of potential claim, so it's not  
really a cloud.

7 (4) TRANSFERRING, ENCUMBERING, OR TERMINATING AN INTEREST IN PROPERTY;  
8 CLEARANCE BY THE DEPARTMENT. (a) A title insurance company or agent that discovers  
9 that a REQUEST FOR NOTICE OF TRANSFER OR ENCUMBRANCE AND NOTICE OF  
10 POTENTIAL CLAIM has been recorded, but against which a TERMINATION OF REQUEST  
11 FOR NOTICE OF TRANSFER OR ENCUMBRANCE AND NOTICE OF POTENTIAL CLAIM  
12 has not been recorded, when performing a title search on real property shall disclose the  
13 presence of the request for notice of transfer or encumbrance in any report preliminary to, or  
14 any commitment to offer, a certificate of title insurance for the real property; and

(ba) Any person transferring title to, encumbering, or  
9 terminating an interest in, property against which a REQUEST FOR NOTICE OF  
10 TRANSFER OR ENCUMBRANCE AND NOTICE OF POTENTIAL CLAIM has  
11 been recorded, but  
12 against which a TERMINATION OF REQUEST FOR NOTICE OF  
13 ENCUMBRANCE AND NOTICE OF POTENTIAL CLAIM has not been recorded,  
14 shall notify the department of the proposed transfer, encumbrance, or termination  
of interest.

---NOTE: Should a person who is acquiring, rather than transferring, title notify  
the department instead?

Comment (RLK23): See language above and  
Comment (RLK13).

15 (cb) If, upon receipt the date of providing the department of the notice under par.

(b), (a), the department determines that

16 the recipient who had the ownership interest in the property when the department  
17 recorded the REQUEST FOR NOTICE OF TRANSFER OR ENCUMBRANCE  
AND NOTICE OF  
18 POTENTIAL CLAIM is alive, the person may transfer title to, encumber, or  
19 terminate an interest in, the property with no further action by the department.

\*\*\*NOTE: Should the department provide some notice to the person? Should a  
document terminating the REQUEST FOR NOTICE be recorded at this time?

20 (de) If, upon receipt the date of providing the department of the notice under par.  
(ba), the department determines that

21 the recipient who had the ownership interest in the property when the department

Comment [RLK24]: A termination probably  
would be recorded at the time of a transfer just  
to prevent monitoring a case where there  
would be no future recovery, but I don't think  
the department should be required to record  
one at that time.

1 recorded the REQUEST FOR NOTICE OF TRANSFER OR ENCUMBRANCE  
AND NOTICE OF

2 POTENTIAL CLAIM has died, all of the following apply:

3 1. The department shall determine whether it has a claim against the property  
4 for amounts paid on behalf of the recipient that are recoverable under s. 46.27 (7g)  
5 (c) 1., 49.496 (3) (a), or 49.682 (2) (a).

6 2. If the department determines that it has no claim under subd. 1., the  
7 department shall issue to the person seeking to transfer title to, encumber, or  
8 terminate an interest in, the real property a CERTIFICATE OF CLEARANCE,  
9 which the person shall record along with the instrument transferring title to,  
10 encumbering, or terminating the interest in, the property.

11 3. If the department determines that it has a claim under subd. 1., the  
12 department shall send to the person a statement of claim that states all of the  
13 following:

14 a. That the department has a claim against the property that it intends to  
15 recover from the property.

16 b. The amount of and basis for the claim.

17 c. That the person has a right to an administrative hearing on the extent and  
18 fair market value of the recipient's interest in the property and how to request an  
19 administrative hearing.

20 d. That the transferee of the recipient's interest in the property may request  
21 from the department a hardship waiver and how to request a hardship waiver.

\*\*\*\*NOTE: What am I missing here? Couldn't the property have changed hands a number of times before the recipient's death? Why would the department have a right to the proceeds (instead of the owner selling the property) after a recipient's death if the property has changed hands a number of times while the recipient was alive?

Comment [RLK25]: Would this cover TOD/life estate beneficiaries? Joint owners as well?

Comment [RLK26]: If the property changed hands prior to the recipient's death we should be notified about the transfer and probably would have issued a TERMINATION OF REQUEST FOR NOTICE OF TRANSFER OR ENCUMBRANCE. If we missed it or were never given the required notice, we should discover that the property changed hands prior to death when we try to file a claim (the current owner would probably let us know about it upon receipt of our claim) and it would most likely be settled before fair hearing or, if not, at the fair hearing. We would then issue/record a certificate of clearance.

1           4. Transferring title to, encumbering, or terminating an interest in, the  
2 property is not valid unless the department issues to the person, and the person  
3 records, a CERTIFICATE OF CLEARANCE.

\*\*\*\*NOTE: The instructions did not indicate how the department would recover against the property if a REQUEST FOR NOTICE OF ENCUMBRANCE AND NOTICE OF POTENTIAL CLAIM has been recorded. Since the department may send the same statement of claim regardless of whether such a document has been recorded, perhaps the provisions of proposed sub. (5) should apply to both situations.

Comment [RLK27]: Proposed sub. (5) should apply in both situations.

4           (5) IF NO REQUEST FOR NOTICE RECORDED. (a) If a recipient, ~~when he or she~~  
5 ~~became eligible for public assistance at death~~, had an ownership interest in  
real property

6 described in sub. (3) (a) 1. or 3. but the department did not record a REQUEST FOR  
7 NOTICE OF TRANSFER OR ENCUMBRANCE AND NOTICE OF  
POTENTIAL CLAIM with

Comment [RLK28]: Should this be 2.?

8 respect to the property described in sub. (3) (a) 1. or 2., upon the death of the recipient  
9 the department may send to the surviving owner of the property a statement of claim  
10 described in sub. (4) (c) 3. The department may recover against the property in the  
11 manner determined by the department to be appropriate, including by placing a lien  
12 on the property. The department may enforce a lien on the property by foreclosure  
13 in the same manner as a mortgage on real property. However, the department may  
14 not enforce any such lien as long as any of the following survives:

15           1. The recipient's spouse.

16           2. The recipient's child who is under age 21 or disabled, as defined in s. 49.468

17 (1) (a) 1.

\*\*\*\*NOTE: Does this apply regardless of how many times the property has been bought and sold while the recipient was alive?

18           (b) If the recipient's surviving spouse or child who is under age 21  
or disabled refinances a mortgage on the

19 property, the department's lien is subordinate to the new encumbrance.

20           (c) The department shall release a lien under par. (a) if any of the following  
21 applies:


Comment [RLK29]: If the property was sold during the recipient's life, the recipient or the spouse would no longer have an interest in the property, marital or otherwise. This only applies if the recipient had an interest at the time of death.





16 recipient while the recipient was receiving public assistance and who survived the  
17 recipient.

18 (d) 1. "Property of a decedent~~recipient~~" means all real and personal property  
to which  
19 the decedent~~recipient~~ held any legal title or in which the decedent~~recipient~~ had any  
legal interest at  
20 the time of death, to the extent of that title or interest, including assets transferred  
21 to a survivor, heir, or assignee through joint tenancy, tenancy in common,  
22 survivorship, life estate, living trust, or any other arrangement.



Comment [RLK32]: Federal law allows us to expand the definition of estate for the recipient (individual) not the decedent (spouse). Our claim in the surviving spouse's estate would only be equal to and against the assets the recipient and spouse shared as a couple from 5 years previous to application to the present. If the surviving spouse's property was not attributable to back to the shared marital property (recipient interest), evidence can be provided that the property is not available for recovery.